

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 479601 and
MERCHANT MARINER'S DOCUMENT
Issued to: Frank Lambert, Jr. Z-227 161

DECISION OF THE VICE COMMANDANT APPEAL
UNITED STATES COAST GUARD

2220

Frank Lambert, Jr.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 14 August 1979, an Administrative Law Judge of the United States Coast Guard at Baltimore, Maryland, after a hearing at Baltimore, Maryland, on 8, 24, and 25 May 1979, ordered Appellant admonished upon finding him guilty of misconduct. The single specification of the charge of misconduct found proved alleges that Appellant, while serving as operator aboard tug NANTICOKE, under authority of the captioned documents, did, on 15 February 1979, while said vessel was under his command, knowingly transit the Nanticoke River with the barge DEBORAH from Seaford, Delaware, to Nanticoke River Buoy No. 4 (LLP 410), in violation of U.S. Coast Guard Captain of the Port of Baltimore order NR 05-79, during the hours of darkness, and without sufficient horsepower.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced into evidence the testimony of one witness and thirteen documents.

In defense, Appellant testified and introduced into evidence one document.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order of admonition.

The decision was served on 15 August 1979. Appeal was timely filed on 11 September 1979, and perfected on 12 February 1980.

FINDINGS OF FACT

On the evening of 14/15 February 1979, Appellant was serving

under the authority of the captioned documents as operator aboard the tug NANTICOKE, which he navigated down the Nanticoke River from Seaford, Delaware, to Nanticoke River buoy No. 4. Because of the disposition of this appeal, further findings are unnecessary.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that (1) the Administrative Law Judge improperly admitted into evidence several documents without permitting Appellant to cross-examine the preparers of those documents, and (2) the Administrative Law Judge improperly found the testimony of the sole Coast Guard witness to be credible.

APPEARANCE: Ober, Grimes & Shriver, Baltimore, Maryland, by John M. Kinsey, Esq.

OPINION

I

AT the outset, a matter affecting the record merits some attention. During the hearing, the Investigating Officer produced a chart for use in demonstrating where various events occurred. Without objection from Appellant, the Investigating Officer asked that the chart not be admitted into evidence, but, instead, that the Administrative Law Judge merely take official notice of it pursuant to 46 CFR 5.20-102. With this request the Administrative Law Judge complied. Subsequently the chart was utilized extensively. Although it has not been contended that the failure to admit this chart into evidence was error, I nevertheless question this practice. It is apparent from the record that the parties and the Administrative Law Judge were able better to understand the factual circumstances through reference to the chart. However, because this chart is not before me, I am not so fortunate. While I might attempt to reconstruct events by reference to an equivalent chart, I certainly would not be able to recreate the markings which were placed upon the original during the hearing. Hence, I believe the better practice would entail admitting such items into evidence, subject, of course, to any appropriate objection. Cf., Decision on Appeal No. 2164 (it "is imperative that references during oral testimony to blueprints, diagrams, charts, etc., be made clear for the record.")

II

During the hearing Appellant strenuously objected to the admission of several items of documentary evidence and has reargued

his objections on appeal. These items included: (1) an abstract from the log of Coast Guard Station Taylors Island, Maryland; (2) a copy of an official radio message from Coast Guard Group Eastern Shore, Chincoteague, Virginia; (3) a copy of a radio log from Group Eastern Shore; and, (4) a translation of somewhat cryptic portions of No. (3) above. the first three items were admitted as business records exceptions and the fourth as a necessary translation of the third.

Appellant objected to their being admitted because of the unavailability for cross-examination of the original preparer of each. Were each of these items merely hearsay evidence, his objection might be sustainable. See, e.g., Decision on Appeal No. 2061. However, where, as here, the evidence is admitted properly under an exception to the hearsay rule pursuant to Rule 803, Federal Rules of Evidence (1975), the right to cross-examine the declarant (preparer of the document) does not come into being.

III

Appellant was charged with violating the following Baltimore Captain of the Port (COTP) order:

Effective 1600 R 12 FEB 79 and until further notice, the Coast Guard Captain of the Port of Baltimore, IAW 33 CFR 160, has imposed the following restrictions upon navigation in the areas of Tangier Sound, Hooper Straights, and the Nanticoke and Wicomico Rivers:

- A. Steel hull vessels only
- B. Minimum of 1100 SHP required for all vessels proceeding independently.
- C. All vessels with less than 1100 SHP will be permitted to transit the area only under Coast Guard escort. Escort may be arranged by contacting Coast Guard Group Eastern Shore via channel 16 VHF-FM or landline at 301-742-9912.
- D. Daylight transit only.
- E.

(This order remained in effect until 18 February 1979).

The Administrative Law Judge found that the Coast Guard had "waived" the escort requirement, but that Appellant nevertheless was guilty of violating the order because he transited the Nanticoke River, "during the hours of darkness, and without

sufficient horsepower."

Initially I must correct a misunderstanding on the part of the Administrative Law Judge. He has construed the minimum 1100 SHP requirement as an absolute, i.e., that it was improper for a vessel with under 1100 SHP to transit the Nanticoke River. The order should be construed as imposing an alternative requirement, viz., either (1) that a vessel must have possessed at least 1100 SHP to proceed independently, or (2) if under 1100 SHP, that it must have been "under Coast Guard escort." As NANTICOKE only produced 800 SHP, the second alternative, but not the first, applied. Because the Administrative Law Judge specifically found that the Coast Guard had "waived" the escort requirement, it was error to find that Appellant had violated the COTP order by transiting the Nanticoke River "without sufficient horsepower."

What remains is a finding that Appellant navigated down the Nanticoke River during the evening of 14/15 February 1979 in knowing violation of the "daylight transit only" restriction of the COTP order. The single most significant issue during the hearing and again upon appeal is whether Appellant actually knew that his actions constituted a violation of that order.

The Investigating Officer's proof of Appellant's actual knowledge consisted of the testimony of a Coast Guard Petty Officer stationed at Coast Guard Group Eastern Shore. He related that he had completed a telephone call on 14 February to Appellant while NANTICOKE was moored in Seaford, Delaware. During this call the entire COTP order purportedly was read to Appellant by this Petty Officer. In spite of Appellant's testimony that this phone call never occurred, the Administrative Law Judge believed the Petty Officer and found that Appellant did have actual notice of the COTP order. (Parenthetically, I note that Appellant testified that he had twice phoned Group Eastern Shore from Norfolk, Virginia, the day before and had spoken to this same Petty Officer on one of the two occasions. Previously, during direct examination by the Investigating Officer, this Petty Officer had admitted speaking to Appellant during one of these phone calls. R.75. Nevertheless, the Administrative Law Judge specifically found that during neither of the two phone calls did Appellant speak to the Petty Officer).

Normally, an Administrative Law Judge's determinations of credibility "will be upheld absent a demonstration that they are arbitrary and capricious." Decision on Appeal No. 2097. Here, I am forced to conclude that the Administrative Law Judge erred in relying upon the testimony of the Coast Guard Petty Officer to find that Appellant had received actual notice of the COTP order.

It was established that Appellant had no office or

representative in Seaford, Delaware. On cross-examination, the Coast Guard Petty Officer admitted that he could not remember whether he had phone Appellant in Seaford on the 13th or on the 14th of February. He also could not remember the telephone number he allegedly had phoned. Most damaging to the Investigating Officer's case is a point not raised by Appellant, perhaps because of his lack of familiarity with the format of Coast Guard radio messages.

Investigating Officer's exhibit No. 13 is a copy of a message from Group Eastern Shore. It includes information which the Coast Guard Petty Officer testified he had received from Appellant during the purported 14 February phone call to Seaford. Appellant's testimony is in direct conflict and was to the effect that this information was provided (presumably by voice radio transmission) as NANTICOKE "went up the river" on 14 February. R. 138. On this point I find the Petty Officer's testimony inherently incredible. It was established reliably that NANTICOKE did not moor in Seaford until 1630 local time. Hence, Appellant could not have received any telephone call before then. Yet, the radio message containing the information allegedly obtained from Appellant over the telephone (Investigating Officer's exhibit No. 13), has a date-time group of "141939Z FEB 79." What this means is that the phone call in question, if made at all, must have been completed before 1439 local time, some two hours before Appellant ever docked in Seaford. As this obviously is impossible, I must conclude that the 14 February phone call never occurred, and therefore, that Appellant never did received actual notice of the requirements of the COTP order he is alleged to have violated. For this reason, I have no choice but to vacate the order of the Administrative Law Judge and dismiss the charge.

ORDER

The order of the Administrative Law Judge, dated at Baltimore, Maryland, on 14 August 1979, is VACATED, the findings SET ASIDE, and the charge DISMISSED.

R.H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C., this 12th day of June 1980.

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